STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
v	No. 254529 Genesee Circuit Court
JAMES MONTGOMERY, Defendant-Appellant.	LC No. 03-013202-FH

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant James Montgomery appeals as of right his jury conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and maintaining a drug vehicle, MCL 333.7405(1)(d) and MCL 333.7406. We affirm.

On September 30, 2003, Officer Terrell Weston and Officer Joseph Lechota of the Flint Police Department were performing routine patrol in an area where the officers had previously made numerous drug trafficking arrests. At approximately 10:45 p.m., the officers were traveling westbound in the 1500 block of Belle Avenue when the officers saw a "goldish '92 Lincoln Town car" backed into the driveway of an abandoned house. As they were passing by, the officers saw two individuals in the vehicle and one person leaning into the vehicle. The officers became suspicious and circled the block. On their second approach, they saw a woman walk away from the Lincoln and leave in another vehicle. This woman was never identified or apprehended.

Officer Lechota got out of the police cruiser and approached the driver's side of the Lincoln while Officer Weston approached the passenger side. Officer Weston noted that the female passenger was holding an open bottle of beer. He asked the passenger to get out of the vehicle, and as she did so, Officer Weston observed suspected cocaine on the floor of the driver's side of the vehicle. Officer Weston stated that he then advised Officer Lechota of the suspected cocaine. According to Officer Lechota, as he approached the vehicle he shined his flashlight into the vehicle, at which point he observed defendant with his hands between his legs. According to Officer Lechota, defendant was trying to crumble up an off-white substance that was falling from his right hand onto the floorboard. Officer Lechota ordered defendant to raise his hands; when defendant failed to raise his hands, Officer Lechota reached into the open driver's side window and grabbed defendant's wrists. As he grabbed defendant's wrists, Officer Lechota saw off-

white rocks falling from defendant's hand onto the floorboard of the vehicle. Officer Lechota testified that the substance appeared to be cocaine. Officer Lechota then helped defendant exit the vehicle, and while doing so, the officer saw a black film vial with a gray top on the floor between the driver's seat and the driver's side door. Officer Lechota patted down defendant for weapons, arrested him for possession of cocaine, and placed him in the rear of the police cruiser. The passenger was arrested for possessing open intoxicants in a motor vehicle.

The officers performed a search of the vehicle. On the driver's side floorboard, Officer Lechota observed several off-white rocks of various sizes. Inside the film vial, Officer Lechota discovered two individually wrapped, off-white rocks. Field-testing of all the rocks revealed that they were, in fact, crack cocaine. Later laboratory testing also revealed that the substances contained cocaine.

Defendant was tried by jury in the Genesee Circuit Court for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and maintaining a drug vehicle. Defendant was convicted of the lesser offense of possession of less than twenty-five grams of cocaine and maintaining a drug vehicle. He was sentenced, as a third-offense habitual offender, MCL 769.11, to concurrent sentences of twenty-five months to eight years' imprisonment for the possession conviction and sixteen to forty-eight months' imprisonment for maintaining a drug vehicle.

On appeal, defendant first argues that Officers Lechota and Weston lacked probable cause to conduct a seizure of defendant and a search of his vehicle because they had no reasonable, articulable suspicion that defendant was involved in criminal activity or posed any danger. We disagree. Defendant never raised this issue below. We review unpreserved claims of constitutional error for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Protection from unreasonable searches and seizures is a fundamental right of both the Fourth Amendment of the United States Constitution and the Michigan Constitution. US Const, Am IV; Const 1963, art 1, § 11. The legality of a search without a warrant or seizure depends on its reasonableness. *United States v Knights*, 534 US 112, 118; 122 S Ct 587; 151 L Ed 2d 497 (2001); *People v Orlando*, 305 Mich 686, 690; 9 NW2d 893 (1943). Absent probable cause, if an officer has "a reasonably articulable suspicion that criminal activity is afoot" he may approach and temporarily detain the person to investigate the possible criminal behavior. *Terry v Ohio*, 392 US 1, 22, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). "Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances." *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). "[D]ue weight must be given, not to [the officer's] inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, *supra* at 27.

Defendant relies on *People v LoCicero* (*After Remand*), 453 Mich 496; 556 NW2d 498 (1996), and finds significant that in that case, where the officers did not see the defendants exchange anything, our Supreme Court concluded that the officers had nothing more than a hunch that the defendants were engaged in a drug transaction. On appeal from this Court, our Supreme Court concluded that under the totality of the circumstances the officers did not have a

reasonable, articulable suspicion to perform an investigatory stop. *LoCicero*, *supra* at 505-508. The Court noted that the area where defendants were observed was not a high crime area or an area known for drug trafficking. *Id*. at 506. The Court explained the requisite amount of suspicion did not attach by the officers merely witnessing the drivers entering a shopping plaza parking lot that was the location of an open business during a reasonable hour of the evening. *Id*. at 507. Other than stating the activity was suspicious, the officers failed to explain how their previous training or experience led them to the conclusion that a drug transaction had occurred. *Id*. at 505, 507. The Court concluded that while the conduct might have created a hunch that criminal activity was transpiring, "a hunch is not sufficient to give rise to reasonable suspicion." *Id*. at 505. "An officer testifying that he inferred on the basis of his experience and training is obliged to articulate how the behavior that he observed suggested, in light of his experience and training, an inference of criminal activity." *Id*. at 505-506.

We conclude that *LoCicero* does not lead to a conclusion that the officers' stop in this case was similarly improper. In fact, *LoCicero* leads to the conclusion that Officers Lechota and Weston did have a reasonable, articulable suspicion to perform an investigatory stop of defendant. Here, the officers testified that as members of the department's Crime Area Target Team, they were conducting routine patrol of an area personally known to them as a high drug trafficking area. During that late night patrol, they observed a vehicle backed into the driveway of a house that was personally known to Officer Lechota to be vacant. Officer Lechota articulated that he became suspicious because there should not have been a vehicle parked in the driveway of the abandoned house in that high drug trafficking area. The officers saw two people in the vehicle and a woman leaning into the vehicle. Officer Weston testified that he saw what appeared to be some type of exchange between the person in the driver's seat and the person leaning into the vehicle. Officer Weston articulated that this indicated to him that there was a possible drug exchange. Thus, the officers had more than a hunch of criminal activity. The officers were able to articulate how the behavior that they observed, in light of their experience and training, gave rise to a reasonable suspicion of criminal activity.

The people argue that the search and seizure of the crack cocaine rocks in the vehicle was valid under the plain-view doctrine because Officer Lechota testified that he saw the substance in plain view as he was approaching defendant's vehicle. The plain-view exception allows seizure of objects falling within the plain view of an officer who has a right to be in the position to have that view and the item's incriminating character is immediately apparent. *People v Wilson*, 257 Mich App 337, 361; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1018; 677 NW2d 29 (2004). Officer Lechota was in a lawful position to view the contraband because, as explained, the officers were justified in approaching defendant's vehicle because they had a reasonable, articulable suspicion that drug activity was occurring. The incriminating nature of an object is immediately apparent if probable cause to seize the item exists without manipulating the item. *People v Champion*, 452 Mich 92, 102-103; 549 NW2d 849 (1996). Here, both officers testified that the off-white rocks on the floorboard appeared to be cocaine. An officer's suspicion that a substance is cocaine is probable cause to conduct an arrest and a search incident to that arrest. *People v Sanders*, 193 Mich App 128, 130; 483 NW2d 439 (1992). Field-testing revealed that they were, in fact, crack cocaine. Therefore, the search and seizure of the crack cocaine rocks in the vehicle was valid under the plain-view doctrine. Defendant has failed to

meet his burden to show that plain error occurred that affected his substantial rights. *Carines*, *supra* at 763-764, 774.

Defendant also argues that defense trial counsel was ineffective for failing to move to quash the information or suppress the crack cocaine. However, this issue has not been properly presented because defendant failed to identify it as an issue in his statement of questions presented. Therefore, it is waived. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nevertheless, we note that because there was no plain error in the officers' stop of defendant or the search of his vehicle, the crack cocaine was admissible. It follows that defense counsel's failure to move to quash the information or suppress the evidence did not deprive defendant of the effective assistance of counsel. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002). [DELETED TEXT]

Defendant also argues that his sentence as a third-offense habitual offender should be vacated because the trial court erred by failing to adhere to MCL 769.13 when sentencing him. Further, defendant relies on *People v Leroy*, 157 Mich App 334; 403 NW2d 555 (1987), to argue that his habitual offender charge should be dismissed because that charge was not brought to trial.

We first note that defendant's reliance on *Leroy* is misplaced because the jurisdictional issue in that case is inapplicable to this case. More importantly, *Leroy* is inapplicable because it was decided under the pre-1994 amendment to MCL 769.13. 1994 PA 110, effective April 29, 1994. The previous rule required that where a defendant pleaded not guilty, he was entitled to a full jury trial on the habitual offender charge. See *Leroy*, *supra* at 339. The new rule reserves to the court consideration of the habitual offender charge. MCL 769.13(5).

On the day of defendant's arraignment, the prosecution filed and served on defendant notice of intent to seek sentence enhancement under MCL 769.11 pursuant to MCL 769.13. The prosecution based this request on defendant's two prior convictions for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). During his arraignment, the court explained to defendant that with the sentence enhancement the maximum sentences for his convictions would be doubled. Defendant agreed that he understood. Therefore, the prosecution complied with MCL 769.13(1) and (2) because on the day of his arraignment they gave defendant written notice of their intent to seek sentence enhancement on the information and on a separate notice of intent, listing the prior convictions that would be relied on for purposes of sentence enhancement. Although entitled to do so pursuant to the procedure set forth in MCL 769.13(4), defendant never challenged the accuracy or constitutional validity of the prior convictions listed in the prosecution's notice.

After defendant's conviction, a presentence investigation report (PSIR) was filed, reflecting that defendant had three prior felony convictions. During sentencing, the court acknowledged the PSIR and the prosecution's request for sentence enhancement, and the court concluded that defendant had three prior felony convictions, which warranted an enhanced sentence as an habitual offender. Although given the opportunity, defendant never objected to the validity or accuracy of the PSIR or the prior convictions during the sentencing hearing. MCL 769.13(6). Therefore, the trial court met the requirements of MCL 769.13(5)(c) in sentencing

defendant as an habitual offender. *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998).

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray